

On appeal, respondent first contends that the ALJ erred in ordering respondent to pay temporary total disability compensation from May 19, 2000, through July 10, 2000. Respondent argues that claimant's treating physician, orthopedic surgeon Kalin D. Kelso, M.D. testified by deposition on August 23, 2000, that he had released claimant to regular work with respondent on May 15, 2000, without restrictions. Respondent contends that claimant then refused to return to work. Second, respondent argues that the ALJ erred in assessing penalties against the respondent for nonpayment of temporary total disability compensation for the period from April 18, 2000, through May 18, 2000 for a total of 4.42 weeks because claimant was released to return to work on May 15, 2000, which is only a period of four weeks instead of the 4.42 weeks the ALJ used to compute the \$110.90 penalty. Third, the respondent contends the penalties order that was entered by the ALJ

on September 6, 2000, for nonpayment of medical bills, failed to specify what medical bills were unpaid. Fourth, the respondent argues there is no evidence in the record of a previous ALJ's order for respondent to pay the Southwest Medical Center bill in the amount of \$1275.00 or the Beaver County Memorial Hospital bill in the amount of \$6,539.25. Fifth, respondent argues the penalties assessed against respondent for nonpayment of medical mileage in the amount of \$213.16, two Vioxx prescription bills in the amount of \$10.00 each, Propoxy-N prescription in the amount of \$5.00, the bill for a knee brace in the amount of \$16.69, the Southwest Medical Center bill in the amount of \$1,275.00 and the Beaver County Memorial Hospital bill in the amount of \$6,539.25 were all paid by the respondent before the April 11, 2001, hearing. Additionally, respondent argues Dr. Mussman's bill of \$655.00 was paid before the April 11, 2001 hearing. Lastly, the respondent argues that the ALJ exceeded her jurisdiction when she assessed a penalty for nonpayment of an earlier penalty in the amount of \$110.90. That penalty had been assessed on September 6, 2000, because respondent failed to pay temporary total disability compensation from April 18, 2000, through May 18, 2000.

Claimant, on the other hand, contends the Appeals Board (Board) lacks jurisdiction to review that portion of the April 25, 2001, Order granting claimant temporary total disability compensation from May 18, 2000 through July 10, 2000, because it was a preliminary hearing order. In regard to the penalties issue, claimant contends the ALJ's award of penalties was correct and/or additional penalties should be ordered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the April 11, 2001, transcript of proceedings, and considering the arguments contained in the parties' briefs, the Board makes the following findings and conclusions:

TEMPORARY TOTAL DISABILITY ORDER

The first part of the ALJ's April 25, 2001, Order deals with claimant's preliminary hearing request for temporary total disability compensation. On February 8, 2001, claimant filed an Application for Preliminary Hearing and at the April 11, 2001, hearing, claimant alleged she was temporarily and totally disabled from performing any substantial and gainful employment from May 19, 2000, through August 23, 2000. The ALJ found claimant was temporarily and totally disabled from May 19, 2000, through July 10, 2000, and ordered respondent to pay those weeks of temporary total disability compensation.

On appeal, respondent argues claimant was released to return to work by her treating physician Dr. Kelso on May 15, 2000. Therefore, respondent contends that the ALJ's order for temporary total disability compensation should be reversed because the preliminary hearing record, which also contained Dr. Kelso's deposition testimony, proves she was not temporarily and totally disabled from performing substantial and gainful employment after May 15, 2000.

Claimant argues, however, that the Board does not have jurisdiction to review the ALJ's preliminary hearing decision on granting temporary total disability compensation. The Board agrees with the claimant. In appeals from preliminary hearing orders, the Board is limited to review of jurisdictional issues listed in the preliminary hearing statute. The preliminary hearing statute also gives the ALJ authority to grant or deny claimant's request for temporary total disability benefits.¹ The Board concludes respondent's appeal in regard to the ALJ ordering respondent to pay temporary total disability benefits should be dismissed.

PENALTIES ORDER

The ALJ's order with respect to penalties is a final order subject to Board review² and further appeal to the Kansas Court of Appeals.³

Before the April 11, 2001, hearing and the resulting April 25, 2001, Order, there had been two previous hearings held and orders issued in this case. The first hearing was a preliminary hearing held on May 23, 2000, in regard to claimant's request for authorized medical treatment, payment of past medical treatment bills as authorized medical and temporary total disability benefits. Claimant alleged she suffered an accident at her work on January 25, 2000, causing injury to her left hip, left leg, and low back. Claimant testified she notified the respondent of the accident and a representative of respondent told her to obtain medical care from any physician she desired.

Claimant first sought medical treatment through chiropractor Dr. Jeffrey L. Mussman. Because claimant did not show any improvement, Dr. Mussman referred claimant to orthopedic surgeon Kalin D. Kelso, M.D. Dr. Kelso kept claimant off work and treated claimant conservatively with medication. Admitted into the preliminary hearing record were medical bills and prescription bills from medical treatment that claimant had obtained before the preliminary hearing, and that she had either paid herself or were still due and owing. Those bills consisted of two prescriptions for Vioxx at \$10 per prescription, a prescription for Propoxy-N for \$5, a bill for a knee brace for \$16.69, two medical bills from Dr. Jeffrey L. Mussman, one for \$172.60 and one for \$655 and a medical mileage request for 678 miles.

The ALJ on June 20, 2000, entered a preliminary hearing Order for Compensation that ordered respondent to pay claimant temporary total disability compensation "commencing from January 27, 2000, until further order or until certified as having reached

¹ See K.S.A. 44-534a.

² See K.S.A. 44-551 and Wain v. Clarkson Construction Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993).

³ See K.S.A. 44-556.

maximum medical improvement; or released to regular job; or becomes re-employed, whichever comes first.” The ALJ also ordered respondent to provide medical treatment for claimant’s injuries, to pay medical mileage to claimant for 678 miles and to pay medical bills including prescriptions. That preliminary order was not appealed to the Board by either party.

Thereafter, in a letter dated June 22, 2000, claimant sent a 20 day demand to respondent’s attorney by certified mail requesting payment of temporary total disability benefits from January 27, 2000. Also requested was payment of medical mileage for 678 miles, and payment of medical bills including prescriptions. Claimant sent another letter to respondent’s attorney dated June 30, 2000, which was a 20 day demand for respondent to pay 31 billing statements from Dr. Mussman for treatments claimant received from January 26, 2000, through June 8, 2000. Those 31 separate billing statements were not totaled by the claimant and were not identified as to whether the billing statements also included any bills that were submitted for payment during the first preliminary hearing. Those 31 separate billing statements totaled \$1,083 and the bills submitted at the May 23, 2000, preliminary hearing totaled \$827.60. In another letter dated July 12, 2000, to respondent’s attorney, claimant requested payment of a billing statement from Southwest Medical Center in the amount of \$1,275.

On July 26, 2000, claimant filed an Application for Penalties alleging respondent failed to comply with the ALJ’s June 20, 2000, preliminary hearing Order. On August 22, 2000, a hearing was held before the ALJ on claimant’s Application for Penalties. At the August 22, 2000, hearing, the ALJ admitted into evidence a copy of claimant’s June 22, 2000, demand letter, a copy of a June 30, 2000, demand letter with copies of Dr. Mussman’s 31 separate billing statements, and a copy of her July 12, 2000, demand letter that included the \$1,275 billing statement from Southwest Medical Center.

In a September 6, 2000, Order, the ALJ assessed respondent and insurance carrier a penalty in the amount of \$25 per week for failure to pay temporary total disability compensation from April 18, 2000, through May 18, 2000 and a penalty of 10 percent for failure to pay each past due medical bill.

In a letter to respondent’s attorney dated December 20, 2000, sent certified mail and titled Notice of Intent and Demand pursuant to K.S.A. 44-512a, claimant requested respondent to pay temporary total disability benefits from May 18, 2000, through August 23, 2000, in the amount of \$2,370.76. Claimant also requested respondent to pay a medical statement from Beaver County Memorial Hospital in the amount of \$6,539.25 and pay penalties in the amount of \$1,004.39 as previously ordered by the ALJ in the September 6, 2000, Order. In another letter to respondent’s attorney dated January 9, 2001, claimant requested respondent to pay penalties in the total amount of \$1,025.75.

At the April 11, 2001, hearing, the ALJ admitted into evidence claimant's December 20, 2000, demand letter with the attached \$6,539.25 bill from Beaver County Memorial Hospital and her January 9, 2001, demand letter. The ALJ also admitted into the hearing record schedules offered by respondent showing the medical bills and temporary total disability benefits that the respondent had paid to claimant and various medical treatment providers.

In the April 25, 2001, Order, the ALJ assessed respondent with a penalty of \$25 per week or \$110.90⁴ for failure to pay temporary disability benefits from April 18, 2000, through May 18, 2000. An additional penalty of \$110.90 was also assessed against respondent for respondent's failure to pay the previous penalty. The ALJ further assessed a 10 percent penalty for failure to pay each past due medical bill and prescription bill which amounted to \$65.50 for Dr. Mussman's bill, \$27.50⁵ for Southwest Medical Center, \$653.93 for Beaver County Memorial Hospital, \$21.36 for medical mileage and \$4.17 for prescriptions for a total of \$994.26 in penalties.

The Board concludes that certain penalties assessed against respondent in the September 6, 2000, Order were final because the Order was not appealed to the Board and, therefore, need not be assessed again in the April 25, 2001, Order. The Board finds the penalties that were final in the September 6, 2000, Order are penalties for 4.42 weeks of unpaid temporary total disability compensation from April 18, 2000, through May 18, 2000, or 4.42 weeks at \$25 per week for a penalty of \$110.50. Further, respondent was assessed with a 10 percent penalty for each past due medical bill. At that time, the Board concludes the unpaid medical bills that were either admitted into evidence at the May 23, 2000, preliminary hearing or the August 22, 2000, penalty hearing or that a 20 day demand had been made before the August 22, 2000, penalty hearing, were for prescriptions of two Vioxx bills in the amount of \$10 each, Propoxy-N prescription for \$5, the knee brace bill of \$16.69, Dr. Mussman's total bill in the amount of \$1,083 and Southwest Medical Center bill in the amount of \$1,275. Thus, the Board concludes that the ALJ's September 6, 2000, penalties Order resulted in penalties in the amount of \$110.50 for the unpaid temporary total disability benefits, \$239.97 for the unpaid medical and prescription bills and \$21.36 for the unpaid medical mileage for a total assessment of penalties of \$371.83.

That order was not appealed by either of the parties and therefore, the Board concludes, that the \$371.83 of penalties assessed against the respondent for those unpaid temporary total benefits, medical bills, medical mileage, and prescriptions itemized above resulted in a final penalties order. The ALJ assessed additional penalties in the April 25, 2001, Order for the unpaid medical bill of Beaver County Memorial Hospital in the amount

⁴The Board finds the penalty computes to \$110.50 instead of \$110.90 (4.42 weeks at \$25.00).

⁵The past due Southwest Medical Center bill was in the amount of \$1,275.00 and 10 percent penalty would equal \$127.50 instead of \$27.50.

of \$6,539.25 and the additional penalty of \$110.90 for respondent not paying the penalty assessed for not paying temporary total disability benefits.

The Board concludes the penalty statute does not contain a provision that allows a penalty to be assessed against the employer for not paying a penalty assessed for failure to pay compensation when due. Conversely, the penalties statute does provide that the employee may maintain an action in district court for collection of past due disability compensation, medical compensation, any civil penalties due, and reasonable attorney fees incurred in connection with the action.⁶

The demand letters sent by claimant to the respondent requesting payment of the Beaver County Memorial Hospital bill in the amount of \$6,539.50 indicate that an unitemized copy of the bill from Beaver County Memorial Hospital was not sent to the respondent until the January 9, 2001, demand letter. Respondent's schedule of payments admitted into evidence at the April 11, 2001, hearing indicates that as of December 22, 2000, before the bill was sent to respondent, the insurance carrier had paid a total of \$2,696.70 to Beaver County Memorial Hospital.

The Board concludes that a penalty should not have been assessed against respondent for nonpayment of the Beaver County Memorial Hospital bill in the amount of \$6,539.50. The Board finds that the ALJ had not specifically ordered respondent to pay this bill as authorized medical compensation and because the respondent had paid at least a portion of the bill before the demand was submitted to the respondent, there is a question as to the particular amount that remains due and owing on the bill, if any, as of the date of the penalty hearing. In conclusion, the Board finds that the ALJ's April 25, 2001, Order in regard to the \$994.26 penalties assessed against the respondent should be reversed and respondent owes no additional penalties other than the \$371.83 in penalties ordered by the ALJ in her September 6, 2000, Order.

WHEREFORE, it is the finding, decision, and order of the Board that the April 25, 2001, Order entered by ALJ Pamela J. Fuller ordering respondent to pay temporary total disability compensation from May 19, 2000, through July 10, 2000, should be affirmed because respondent's appeal is dismissed as the Board does not have jurisdiction to review that preliminary hearing issue. The Order is reversed as to ordering respondent to pay a total of \$994.26 in penalties to the claimant.

IT IS SO ORDERED.

Dated this ____ day of September, 2001.

⁶See K.S.A. 44-512a.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Claimant's Attorney
Terry J. Malone, Respondent's Attorney
Pamela J. Fuller, Administrative Law Judge
Phil S. Harness, Workers Compensation Director